



Brian Schweitzer
Governor

MONTANA PUBLIC DEFENDER COMMISSION

Richard E. "Fritz" Gillespie
Chair

Reformation of the PDC:

- ◆ A commission composed of five attorneys with significant experience in cases handled by OPD or committed to quality representation will not with any certainty cure things in the agency perceived to need fixing
- ◆ The important, appropriate requirements of our open meeting laws for public participation combined with the fact that the commission is composed of and would remain composed of volunteers with other endeavors contribute significantly to the speed with which the PDC oversees issues that arise over the operation of OPD - not because 11 commissioners stagnate action
- ◆ Vesting 80% of the appointment power in the leadership of the Legislature and 20% in the Chief Justice alone is contrary to the first of the ABA *Ten Principles of a Public Defense Delivery System* calling for diverse authorities appointing an independent oversight board so the indigent defense function is "... independent from political influence and subject to judicial supervision only in the same manner and to the same extent as retained counsel."
- ◆ The proposed reformation of the PDC increases the risk of interference in the delivery of effective assistance of counsel by severely restricting the current direct participation in the oversight of OPD by the general public and by persons familiar with the nuances regarding the needs of those the agency serves
- ◆ The proposed reformation of the PDC breaches the terms and spirit of paragraph 1.a. of the May 7, 2004 "Stipulation and Order of Postponement of Trial" entered into between the parties in *White, et al. v. Martz, et al.* wherein it was agreed the legislation would provide for the members of the PDC to be "... appointed by the different branches of government and the Montana State Bar Association."

Eligibility:

- ◆ A requirement for filing a financial eligibility affidavit with the prosecuting entity is a clear intrusion into the independence of the public defense function
- ◆ Current process:
 - A court orders OPD to immediately assign counsel prior to an eligibility determination when an accused informs the court that he or she is without the financial ability to retain an attorney - 46-8-101(2) and 47-1-111(1)(a)
 - The person is entitled to the full benefit of public defender services until the court's assignment order is rescinded - 47-1-111(1)(a)
 - A timely, detailed financial statement and affidavit swearing under oath to the truthfulness of the information must be submitted - 47-1-111(2)(a)
 - The current form is not notarized but the person can be prosecuted for false swearing or unsworn falsification to authorities - 45-7-202 and 45-7-203
 - OPD, but not the public defender assigned, screens the application and makes the eligibility determination:
 - 133% of poverty level determinations are made at regional level - documentary verification of not less than 10% of randomly selected applications is done; more when OPD resources permit
 - All 47-1-111(3)(b) hardship determinations are made based on verification of financial circumstances, availability of private counsel, and other information deemed relevant
 - Anyone, including the court or a prosecutor, may submit information to OPD regarding eligibility before or after a determination
- ◆ OPD does in fact notify courts that appointing orders should be rescinded when it has information the applicant does not qualify
- ◆ The PDC has looked at the procedures for determining eligibility as a way of reducing the stress the caseload has put on the agency from the beginning of operations and expects as robust of an evaluation as OPD resources permit
- ◆ The criminal justice system does not have the resources to verify the eligibility of every application for public defender services in more than 20,000 cases per year
- ◆ Requiring the affidavit to be notarized places additional time and financial burdens on the criminal justice system
- ◆ Any OPD eligibility determination is subject to inquiry, review, and approval or denial by the court [47-1-111(1)(d)] although the first of the ABA *Ten Principles of a Public Defense Delivery System* notes that "Removing oversight from the judiciary ensures judicial independence from undue political pressures and is an important means of furthering the independence of public defense."

Payment of the Costs of Representation.*

- ◆ Courts decide who has the financial ability to pay for the costs of representation and the extent of that ability - not OPD
- ◆ Courts must conduct a hearing and affirmatively find the extent to which an OPD client has the financial ability to pay before ordering an amount to be paid
- ◆ The PDC agrees that an OPD client should pay reasonable costs of representation within the client's financial ability to pay over a reasonable period of time
- ◆ 46-8-113, 46-8-114 and 46-8-115 as currently codified have provisions that pass constitutional muster for a court to impose the payment of the cost of representation as part of or a condition of a sentence - *State v. Ellis*, 339 Mont. 14, 18-19, ¶16 - ¶17 (2007); *State v. Farrell*, 207 Mont. 483, 491-92 (1984), citing *Fuller v. Oregon*, 417 U.S. 40 (1974)
- ◆ The amendments proposed to 46-8-113 as subsections (6) - (11) have provisions that appear to be inconsistent and in conflict with the current, constitutionally sound provisions of 46-8-113, 46-8-114 and 46-8-115
- ◆ The amendments proposed to 46-8-113 as subsections (6) - (11) have provisions similar enough to the Kansas statutory scheme struck down in *James v. Strange*, 407 U.S. 128 (1972), to indicate the high probability that the proposed amendments are not constitutional - *State v. Ellis*, 339 Mont. 14, 18-19, ¶14 - ¶17 (2007)
- ◆ There is enormous competition among restitution, charges, fees, fines, and costs of several varieties for the limited resources of OPD clients
- ◆ Payment of the costs of representation is given the last priority under 46-18-251(2) and OPD is paid after the payment of the other assessments are paid
- ◆ OPD likely will receive more payments if the payment of the costs of representation is lifted to the same level as the payment of other costs listed in 46-18-251(c) or higher and 46-8-114 is amended to provide that payments will be made to the clerks of the courts to forward to the department of revenue for deposit into the public defender account in the state special revenue fund
- ◆ A public defense agency should not be responsible for collecting client fees to avoid ethical interference with the attorney-client relationship according to the commentary to ABA *Defense Services Standard 5-7.2*

* For more details about the Montana sentencing structure see the "Assessments and Payment of Costs for Assigned Public Defenders" memo submitted in the *Montana Public Defender Commission Fiscal Year 2010 Report*

Chief Public Defender as Secretary to the PDC Providing Administrative Support:

- ◆ To ensure effective assistance of counsel is provided, additional FTEs are needed to meet the caseload demands which are increased more by the reduction in caseloads carried by the chief and deputy public defenders
- ◆ The volunteer PDC cannot function without a secretary and administrative support
- ◆ Without funding for FTEs in addition to those already sought, a secretary and administrative support will have to come from existing FTEs if the PDC is to perform its function
- ◆ A secretary and administrative support staff separate from OPD staff will create an unnecessary duplication of processes

Reduction in Caseloads Carried by the Chief and Deputy Public Defenders:

- ◆ In Policy 114 the PDC limited the caseload of the chief public defender to 300 hours/year acting as second chair in trial work
- ◆ In Policy 114 the PDC set a caseload range of 600 to 1,400 hours/year for deputy regional public defenders depending largely on the number of personnel supervised plus other factors listed in paragraph 2.7 of Policy 114
- ◆ As opposed to hour flexibility, limiting regional public defenders to a fixed number of active cases ignores the unique needs and interests among the regions and will require more FTEs or more than \$20/hour more expensive contract work

Conflicts Manager:

- ◆ The PDC has already created a .5 FTE position for a conflicts manager who will report directly to the PDC
- ◆ The position is ready for posting

Right to Counsel:

- ◆ The PDC and OPD support an amendment to 46-8-101 which makes it clear that a public defender will not be appointed to represent a qualified defendant charged with an offense if the court makes an unqualified waiver of incarceration as a sentencing option if the defendant is convicted
- ◆ In conjunction with representatives of the county attorneys association this language was proposed for a new subsection (3) to 46-8-101 outlining the process in more detail than in the proposed amendment

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